IN THE SUPERIOR COURT OF BIBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	:	
	:	
v.	:	**INDICTMENT: 11-CR-67684**
	:	**(Murder)**
STEPHEN MCDANIEL	:	

[1]
MOTION FOR BOND

Stephen McDaniel, with the help of counsel, moves this court to set a reasonable bond on the charge of murder, for which he has been incarcerated since August 2, 2011. In support of this motion, Mr. McDaniel offers the following:

Introduction

1.

Warrant number 189155-C was executed on August 2, 2011, charging Mr. McDaniel with murder. On November 15, 2011, the grand jury indicted Mr. McDaniel for murder. November 15, 2011, is 105 days after August 2, 2011. Mr. McDaniel, therefore, is entitled to bond by statute (O.C.G.A. § 17-7-50; O.C.G.A. § 17-6-1) because the grand jury failed to indict him within 90 days of his arrest. The District Attorney,

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moreover, failed to seek an extension of time within the 90-day limit, as required by law in a capital case. O.C.G.A. § 17-7-50.

2.

The only issue before the Court in this motion, therefore, is the amount of bond to be set. Mr. McDaniel will produce evidence sufficient to show this Court that he does not pose a significant risk to flee the jurisdiction of this court or fail to appear when required, does not pose a significant threat of danger to persons or property in the community, does not pose a significant risk of committing any felony pending trial, and does not pose a significant risk of intimidating witnesses or otherwise obstructing the administration of justice. O.C.G.A. § 17-6-1(e)(1)-(4).

3.

Mr. McDaniel requests that this Court schedule a hearing at which time he will produce evidence in support of a reasonable bond in an amount to be specified at the hearing, which then shifts the burden to the State to persuade this Court by a preponderance of evidence that Mr. McDaniel poses one of the enumerated risks listed above, in significant

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proportion, to justify a greater amount of bond than that requested by the defense (a "greater amount" because a denial of bond is no longer an option because of the failure to indict within 90 days of arrest or to seek an extension within that 90-day period). Any request by the State that bond be denied is now moot because untimely.

The Law

1. *Stephen McDaniel is Entitled to Bond as a Matter of Law Because the Grand Jury Failed to Indict Within 90 days of Arrest and the District Attorney Failed to Seek an Extension*

Georgia law relating to bond when a defendant has been incarcerated for 90 days without having been indicted within those 90 days holds as follows:

> Any person who is arrested for a crime and who is refused bail shall, within 90 days after the date of confinement, be entitled to have the charge against him or her heard by a grand jury having jurisdiction over the accused person; provided, however, that if the person is arrested for a crime for which the death penalty is being sought, the superior court may, upon motion of the district attorney for an extension and after a hearing and good cause shown, grant one extension to the 90 day period not to exceed 90 additional days; and, provided, further, that if such extension is granted by the court, the person shall not be entitled to have the charge against him or her heard by the grand jury until the expiration of such extended period. In the event no grand jury considers the charges against the accused person within the 90 day

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> period of confinement or within the extended period of confinement where such an extension is granted by the court, the accused shall have bail set upon application to the court.
>
> O.C.G.A. § 17-7-50.

Stephen McDaniel was arrested for murder on August 2, 2011. The warrant on which he was arrested accuses him of murder. Ninety days after the date of arrest fell on November 1, 2011. The grand jury indicted Mr. McDaniel for murder on November 15, 2011, the same charge for which he was arrested on August 2, 2011. The date of indictment, therefore, is 105 days after the date of arrest for the same crime.

This statute applies to Mr. McDaniel even though he has not had a previous bond hearing within the 90 days and, thus, has not been "refused bail" at the conclusion of a bail hearing. Thus, O.C.G.A. § 17-7-50 applies even when the defendant does not seek bail until after 90 days has passed. *State v. English*, 276 Ga. 343, 347, 578 S.E.2d 413 (2003).[1]

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[1] "[E]ven though English did not petition for bond within 90 days of his arrest and incarceration, the fact that he remained in jail is tantamount to his being 'refused bail.'" *English* at 348.

Since O.C.G.A. § 17-7-50 requires that this Court set a bond for Mr. McDaniel, the amount of that bond remains the only issue left to resolve. To deny bond now would violate Georgia law. In addition, this Court must set a reasonable bond that does not violate the prohibitions against excessive bail in the Eighth Amendment to the U.S. Constitution and Article I, Section I, Paragraph XVII of the Georgia Constitution. The remainder of this motion addresses the legal issues that come into play in setting a reasonable bond.

2. The Presumption of Innocence Applies in All Cases Under Georgia Law

This venerable phrase – "the presumption of innocence" – continues to reverberate in American courtrooms and in judicial opinions all around our state and nation. As any experienced criminal defense lawyer will admit, however, it would be dangerous to assume that the public, particularly those from among whom one is about to select a jury to hear the State's case, for instance, fully understands it, appreciates it, or actually believes it. In a time when a professionalized police force normally, but not always, does a good job at investigating and solving crimes, and prosecuting attorneys normally, but not always,

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exercise prudence in evaluating and charging cases, it is no wonder that those who were "presumed to be innocent" at arrest and indictment ultimately plead guilty to some charge or other at the rate of about 95 out of every 100 cases. The popular presumption, therefore, that many make is that the person arrested or, worse, indicted "must be guilty of something."

At this juncture of a case, however, and among those who labor daily in the criminal courts—judges, prosecutors, and defense lawyers—the phrase "presumption of innocence" should still carry great weight. The question is this: How do we invest this phrase with any substance when a defendant stands accused of a heinous crime, to which he intends to plead not guilty and to defend himself thoroughly, but sits in a county jail, a clear form of punishment without a finding of guilt—in this case for nine months—and who now asks to be released on bond?

According to the United States Supreme Court, "[u]nless [the] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 341 U.S. 1, 4, 72 S.Ct. 1, 96 L.Ed. 3 (1951). Those "centuries of struggle" in Anglo-American jurisprudence were waged against the overreaching

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power of the state, embodied in the English Crown for many hundreds of years, until the union of free people in America formed itself under the rule of law and the presumption of innocence ultimately became woven into the fabric of our collective conception of due process.[2] Georgia, unlike many other states, extends this presumption of innocence even to those accused of a capital crime.[3] Thus, neither the execution of an arrest warrant nor an indictment by a grand jury, both of which have occurred in this case, eviscerates or even shifts the presumption of innocence away from Stephen McDaniel.

3. *The Burden of Persuasion Regarding the Amount of Bail Rests Upon the State by a Preponderance of Evidence*

In order for the presumption of innocence to have any meaning in this context, the Georgia Supreme Court has placed on the State the

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[2] "Every person is presumed innocent until proved guilty. No person shall be convicted of a crime unless each element of such crime is proved beyond a reasonable doubt." O.C.G.A. § 16-1-5. In federal law, the concept receives imprimatur in *Coffin v. United States*, 156 U.S. 432, 15 S.Ct. 394 (1895). In that case, the trial court refused to charge the jury in a bank fraud case that the "law presumes that persons charged with crime are innocent until they are proven, by competent evidence, to be guilty. To the benefit of this presumption the defendants are all entitled, and this presumption stands as their sufficient protection, unless it has been removed by evidence proving their guilt beyond a reasonable doubt." Id. at 452. In reversing the conviction, Justice White wrote: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Id. at 453. Justice White follows up this pronouncement by tracing the history of the concept from ancient Hebrew canonical law through Roman, Greek, and English law into American jurisprudence. Id.

[3] *Vanderford v. Brand*, 126 Ga. 67, 54 S.E. 822 (1906). *See* Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 Wis.L.Rev. 441.

burden of persuading a court that a defendant is ***not*** entitled to bond (or, again in this case, to a higher bond than may otherwise be imposed since some bond amount *must* be set). *Ayala v. State*, 262 Ga. 704, 706, 425 S.E.2d 282 (1993); O.C.G.A. § 17-7-50. All the defendant need do to require the State to attempt to meet its burden is to produce some evidence that he has roots in the community. *Ayala* at 705. The burden of production, moreover, simply means the showing of evidence "such that a reasonable [person] could draw from it the inference of existence of a particular fact to be proved." *Ayala* at 705, n. 2, *citing* 3 C. McCormick, *Evidence*, § 338, at 953 (3d 3d. 1984). The particular facts to be proved by Mr. McDaniel at a hearing on this motion will include the length and character of his residence in Macon and Lilburn, Georgia, his educational and vocational pursuits during the past several years, family ties in the area, and the complete absence of any criminal history.

Once the defendant produces these facts, the burden shifts to the State to persuade the Court to deny bond, or, in this case, to set a higher bond than that requested by the defendant.[4] This persuasion must

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[4] Though, as has been shown above, the failure of the grand jury to indict within 90 days of Mr. McDaniel's arrest and the failure of the District Attorney to seek an extension of this period within the 90 days means that the court *cannot* now deny bond, but must set a reasonable bond that does not violate the

consist of evidence sufficient to show by a preponderance of the evidence, which means the greater weight of evidence, that Mr. McDaniel poses one or more of the risks set forth in the bond statute and, moreover, poses one or more of these risks in "significant" proportion. O.C.G.A. § 17-6-1(e)(1)-(4). A "preponderance of the evidence" means "that superior weight of evidence upon the issues involved, which, while not enough to free the mind wholly from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other." O.C.G.A. § 24-1-1(5). Thus, in order to persuade this Court to set a bond higher than the defendant seeks, the State must produce evidence superior to that produced by Mr. McDaniel regarding his ties to the community and his lack of danger to anyone in the community.

This Court should not entertain the sort of evidence often produced by the State in its effort to rebut the production of evidence of community ties offered by defendants in case after case in this circuit. That sort of rebuttal evidence usually consists in nothing more than a

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prohibitions against excessive bail in the Eighth Amendment to the U.S. Constitution and Article I, Section I, Paragraph XVII of the Georgia Constitution.

recitation of allegations contained in the arrest warrant, a police report, or an indictment. To offer nothing more than this as evidence against bond is to render the presumption of innocence virtually meaningless. It amounts to a request to deny the petition for bond simply because the District Attorney believes that the defendant is guilty.[5] A preponderance of evidence of one of the statutory risks in significant proportion is required and the State should be held to this burden.

The defense acknowledges, however, that the weight of evidence against a defendant may serve as *a factor* in evaluating the State's burden of persuading the court that the defendant poses a significant risk to flee.[6] But in order for this Court to weigh the evidence of flight properly, the State must produce such evidence at a bond hearing if it wishes to

[5] The D.A. should believe this, of course, or else he shouldn't be prosecuting the person in the first place. So, merely reciting the grounds for his personal belief in the defendant's guilt has little to no probative value in a bond hearing. *See Georgia Rules of Professional Conduct, Rule 3.8:* "The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . . ." The irony here is that the prosecutor is the only person in the criminal process who is allowed--in fact, required--*not* to presume the defendant's innocence when prosecuting him, which is all the more reason for him to put up evidence to persuade the Court against bond, so that the Court can evaluate the evidence on its own, without relying upon the personal belief of a prosecuting attorney, which has no probative value at all.

[6] While no Georgia statute addresses it, the federal Bail Reform Act identifies among the factors to be considered in determining pre-trial release the "weight of the evidence against the person." 18 U.S.C. § 3142(g)(2). It makes sense that if the State could produce overwhelming evidence of guilt, and if the stakes were high enough—and they cannot get any higher than in a death penalty case—that a pre-trial releasee may have a greater incentive to skip bond and flee the jurisdiction. This logic aside, however, the State should still reveal this evidence to the Court if it wishes to rely upon it in persuading the Court to set a higher bond in this case than the defendant seeks. Simply asserting that this is a murder case and that the District Attorney seeks the death penalty is not enough.

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depend upon it in seeking a higher bond than the defendant seeks. An arrest warrant and an indictment are not evidence. The defense will object—and gives notice of that objection here—to a mere offer of proof, customary in non-death penalty cases in this circuit, and will demand, instead, that witnesses with knowledge of relevant and admissible evidence be sworn and examined so that the defendant may exercise his Sixth Amendment right to confront and cross-examine them. So, while offers of proof are common in bond hearings in non-death cases in this circuit, that procedure should not be allowed in this case.

Conclusion

Mr. McDaniel is entitled to bond on the charge of murder. Even if this Court now finds that he poses one of the statutory risks in significant proportion, the State's failure to comply with O.C.G.A. § 17-7-50 requires that "the accused shall have bail set upon application to the court."

Therefore, Mr. McDaniel requests that this Court set a reasonable bond.

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March 15, 2012.

(by FJH with permission)

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CERTIFICATE OF SERVICE

I certify by my signature that I have served a copy of the foregoing **Motion for Bond** upon the office of the District Attorney for the Macon Judicial Circuit by delivering it to:

Gregory W. Winters
District Attorney
Macon Judicial Circuit
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March 15, 2012.

FRANKLIN J. HOGUE

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